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No. 92-452

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CLAYTON J. POWELL AND DARLENE W. POWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In opposing the petition, respondents raise three issues that were not considered or addressed by the court of appeals.

1. As discussed in the petition (Pet. 6 & n.7), the court of appeals did not address respondents' assertion (Br. in Opp. 9-10) that the notice of deficiency issued on February 29, 1988, was not mailed to the taxpayers' "last known address" because it was not mailed to the "new" address shown on the return they filed with the Service on February 11, 1988. The court of appeals accepted, for purposes of its decision, the Tax Court's conclusion that the "new" address shown on the return filed in 1988 was not received in sufficient "time for the Service to have posted that new address" before issuing the notice of deficiency (Pet. App. 13a). See Pet. App. 9a. That

conclusion comports with the consistent view of the courts of appeals that the Service must be allowed "a reasonable time for processing" before new information is attributed to the agency in issuing notices of deficiency. *Williams* v. *Commissioner*, 935 F.2d 1066, 1068 (9th Cir. 1991); see Pet. 6 & n.7.

In this case, however, the court of appeals concluded that the notice of deficiency was invalid for two entirely different reasons. Without disputing that the notice was mailed to the "last known address" reflected in the Service's records, the court concluded that the notice was invalid (i) because it was not in fact *received* by the taxpayers and (ii) because, with information obtained *after* the notice was mailed, the Service could, through "reasonable diligence," have discovered the taxpayers' correct address (Pet. App. 7a-8a). These holdings conflict with numerous other decisions. The conclusion that actual *receipt* is required for the notice to be valid is inconsistent with the plain language of the statute (26 U.S.C. 6212 (b)(1)) and with *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988); *Keado* v. *United States*, 853 F.2d 1209, 1212 (5th Cir. 1988), and *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978). See also Pet. 11-13. The further conclusion that information obtained *after* the notice is mailed may retroactively invalidate the notice conflicts with *Williams* v. *Commissioner*, 935 F.2d 1066, 1067 (9th Cir. 1991); *Pomeroy* v. *United States*, 864 F.2d 1191, 1193-1195 (5th Cir. 1989), and *Brown* v. *Lethert*, 360 F.2d 560, 561 (8th Cir. 1966). See also Pet. 14-16.

Respondents do not seriously dispute that the decision in this case conflicts with those decisions. Instead, in describing the conflicting decisions, respondents point to *irrelevant* legal propositions set forth in

each decision and contend that those *irrelevant* holdings do not conflict with the decision in this case. For example, respondents note (Br. in Opp. 7-8) that in *King* and *Pomeroy* the courts held that a taxpayer's "last known address" is the address on his most recent tax return which, in those cases, had been received and processed by the Service. While respondents' description of those decisions is correct as far as it goes, it does not go far enough. In *Pomeroy*, for example, the court of appeals further held that the question whether a notice of deficiency was mailed to the taxpayer's "last known address" is to be determined by considering "the information available to the IRS *at the time it issued the notice of deficiency*." 864 F.2d at 1195 (quoting *Mulder* v. *Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988)). Similarly, in *King*, the court stated that "[n]othing in the statute suggests that the IRS is obligated to take additional steps to effectuate delivery if the notice is returned; indeed, a notice mailed to the last known address is sufficient *even if it is never received*" (857 F.2d at 681 (emphasis added). These holdings, as well as the holdings of the cases cited above, squarely conflict with the decision in this case.

2. Respondents contend that the conflict created by the decision in this case need not be addressed because, in respondents' view, no taxes are owed in any event. Respondents claim that they owe no taxes because "the parties entered into a final settlement in accordance with the Internal Revenue Code" (Br. in Opp. 6). That assertion, which obviously goes to the merits of the underlying dispute, has not been presented to or considered by either court below. It is a claim that respondents properly may address in further proceedings, but it is not properly presented to this Court in the first instance. While we strongly

disagree with respondents' assertion that its tax liabilities have been settled,[1] that claim on the merits is not at issue at this stage of the litigation.

Indeed, under the decision of the court of appeals, the merits of respondents' liability for these taxes will *never* be at issue. As respondents observe (Br. in Opp. 15), if the notice of deficiency issued by the Commissioner on February 29, 1988, is invalid, collection of respondents' associated tax liability is now barred by the statute of limitations. It is precisely for that reason that the decision in this case threatens significant injury to the routine administration of the federal income tax. By jeopardizing the normal collection of revenues from the hundreds of thousands of delinquent taxpayers each year who change their places of residence, the decision of the court of appeals meaningfully impairs the statutory scheme for the assessment and collection of taxes and threatens significant injury to the public fisc.[2]

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[1] The payment of $472.69 that respondents claim (Br. in Opp. 2) was made as a final settlement of their tax liabilities had no relationship to the deficiency asserted by the Commissioner in the notice issued on February 29, 1988. That notice arose from a partnership in which respondents held an interest (C.A. App. 14). No settlement concerning that deficiency was reached. Since no "closing agreement" (26 U.S.C. 7121) was made for the year of that deficiency, assertion of that deficiency is not barred by any prior settlement reached concerning *other* deficiencies previously identified for that same year. See *Smith* v. *United States*, 850 F.2d 242 (5th Cir. 1988).

[2] Respondents assert that Revenue Procedure 90-18, 1990-1 C.B. 491, may alleviate the significant administrative problems created by the decision in this case *if* the Procedure "passes statutory and constitutional muster" (Br. in Opp. 16). That assertion makes no sense, for the Revenue Procedure only gives notice of the time that the Service requires to input

3. Respondents erroneously contend (Br. in Opp. 16-20) that due process requires that the notice of deficiency be received by the taxpayers for it to be effective. They contend that actual receipt of the notice is constitutionally required so that they may challenge their tax liability in the Tax Court *before* the taxes are assessed and collected, instead of in a refund action in the district court or the Claims Court. This claim has often been raised and has consistently been rejected. See, *e.g.*, *Morse* v. *IRS*, 635 F.2d 701 (8th Cir. 1980); *Lewin* v. *Commissioner*, 569 F.2d 444 (7th Cir.), cert. denied, 437 U.S. 904 (1978); *Wilson* v. *Commissioner*, 564 F.2d 1317 (9th Cir. 1977), cert. denied, 439 U.S. 832 (1978); *Berger* v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962).[3] The loss of the opportunity to have an in-

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change of address information into its computer records. See Pet. 6-7 n.7. The court of appeals specifically chose not to address that issue in this case. See Pet. 6 & n.7. Moreover, nothing in the Revenue Procedure has any bearing on the court of appeals' erroneous conclusions (i) that the notice of deficiency must be *received* by the taxpayer to be effective or (ii) that the Service must diligently consider information obtained *after* the notice is issued (such as returned mail) for the notice to be valid under the statute (Pet. App. 7a).

[3] For example, in *Lewin*, the Internal Revenue Service sent a notice of deficiency by certified mail to the taxpayer's home. The letter carrier tried to deliver it, but no one answered the door. A postal service form was left to indicate that the mail would be held at the post office. But the taxpayers, claiming that they never received the form, failed to pick up the mail and it was returned to the Internal Revenue Service unclaimed. The court rejected the taxpayers' argument that the mailing of the deficiency notice was defective because it was never received; the court further held that the absence of

come tax liability determined before the tax is paid does not violate due process because "Congress, if it chose to do so, could have required the taxpayer to pay first and then litigate, in all cases." *Cohen* v. *United States*, 297 F.2d at 772. See *Phillips* v. *Commissioner*, 283 U.S. 589, 599 (1931) ("the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount").

In any event, this claim (along with the other claims raised by respondents in their brief in this Court) was not addressed or considered by the court of appeals. The issues that the court of appeals *did* address were decided by it in a manner that conflicts with decisions of other courts of appeals and threatens recurring, significant injury to the routine collection of taxes.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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delivery did not violate due process. The court explained that "[p]ersons in the taxpayers' position have the constitutionally adequate remedy of paying the tax and then instituting a refund suit, with the result that failure to receive the deficiency notice, where there has been compliance with the statutory procedures for notice, and the consequent loss of access to the Tax Court violates no constitutional safeguards." 569 F.2d at 445.

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